UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MITSUBISHI HEAVY INDUSTRIES, LTD., et al.,

Plaintiffs,

- against -

STONE & WEBSTER, INC.,

Defendant.

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08 Civ. 00509 (JGK)

MEMORANDUM OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The petitioners, Mitsubishi Heavy Industries, Ltd. and Mitsubishi Power Systems Americas, Inc. ("MHI" and "MPSA," respectively; "Mitsubishi," collectively), filed this petition to vacate a Partial Final Award ("Award")[1] entered by a Tribunal ("Tribunal") of the International Centre for Dispute Resolution ("ICDR") in favor of the respondents, Stone & Webster, Inc. ("Stone & Webster"), on contract claims between the parties. Stone & Webster cross-petitioned to confirm the Award. The petition and cross-petition have been brought pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq. Subject-matter jurisdiction is based on diversity of citizenship.[2] 28 U.S.C. § 1332.

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[1] The Tribunal's Partial Final Award is attached as Exhibit A to the Affirmation of Philip R. White, dated January 18, 2008 ("White Affirmation").

[2] There is complete diversity of citizenship in this case. MHI is organized under the laws of Japan and has its principal place of business in Japan. MPSA is incorporated in Delaware and has its principal place of business in Florida. Stone & Webster is incorporated in Louisiana and has

I

A

The following facts are undisputed and are taken from the Tribunal's Award dated October 22, 2007, unless otherwise indicated.

On January 31, 2001, AES Wolf Hollow, L.P. and AES Frontier, L.P. (collectively, "AES") entered into two contracts ("Supply Contracts") with the petitioners to supply equipment for a power plant project located in Hood County, Texas. (Supply Contracts 5.)[3] AES assigned those contracts to the National Energy Production Corporation ("NEPCO"), its construction contractor for the project. (Def.'s Statement of Case 13.)[4] NEPCO defaulted on its contract with AES in December 2001 and assigned the Supply Contracts back to AES in January 2002. (Def.'s Statement of Case 13-14.) In March 2002, the respondent, Stone & Webster, succeeded NEPCO as the contractor for the project. (Def.'s Statement of Case 11.) AES then assigned the Supply Contracts to Stone & Webster.

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its principal place of business in Louisiana. More than $75,000 is at stake in the controversy. (Pet. to Vacate 1-3.)

[3] The Supply Contracts are attached as Exhibits D and E to the White Affirmation.

[4] Stone & Webster's Statement of Case to the arbitration Tribunal is attached as Exhibit F to the White Affirmation.

The Supply Contracts provided that Mitsubishi would supply two heat recovery steam generators, two combustion turbine generators, and one steam turbine generator for the power plant project. (Award 8.) The contracts required Mitsubishi and Stone & Webster to meet project schedules attached to the Supply Contracts. The Supply Contracts stated that Mitsubishi would pay liquidated damages if, among other reasons, it failed to meet a delivery date or its equipment caused a delay in the project schedule. (Award 40.) However, Article 9.1.2 of the Supply Contracts provided that any liquidated damages against Mitsubishi "shall become due only to the extent such liquidated damages are paid" by Stone & Webster to AES. (Award 40.) These liquidated damages were due even if Stone & Webster and AES "resolve any liquidated damages due . . . by way of negotiated settlement," in which case, "to the extent included in such settlement, the liquidated damages shall remain due and payable from" Mitsubishi to Stone & Webster. (Award 40.)

The project was delayed 296 days beyond the guaranteed completion date. (Award 8.) AES assessed liquidated damages against Stone & Webster as a result of the delay in the form of "price rebates," money withheld by AES on the contract price otherwise owed to Stone & Webster. (Stone & Webster's Texas Compl. 9-10, 20.) Stone & Webster subsequently sued AES in

Texas state court to recover the withheld money.[5] (Award 13.) On December 22, 2005, Stone & Webster and AES entered into a confidential settlement agreement in the Texas action. (Award 13.)

B

In accordance with the Supply Contracts, Stone & Webster commenced arbitration against Mitsubishi on August 29, 2003. (Award 13-14.) In its Demand for Arbitration, Stone & Webster claimed that Mitsubishi was responsible for 282 days of the project's delay (Award 8) and sought: 1) a declaration that it was entitled to liquidated damages from Mitsubishi; 2) an award against Mitsubishi for "recoverable or actual damages;" 3) attorneys' fees and costs from Mitsubishi; 4) interest (Award 14); and 5) awards on other delay and warranty claims. (Award 645-46.) Mitsubishi made several counterclaims against Stone & Webster. (Award 606-07.) A three-member arbitration Tribunal was appointed, as stipulated in the Supply Contracts. (Award 12-13.)

The Tribunal held evidentiary hearings during May, 2005. (Award 16.) By a two-to-one majority, it issued a Partial Final Award on October 22, 2007 that purported to "finally decide[]

[5] Stone & Webster's Complaint in the Texas action is attached as Exhibit F to the Affidavit of Loryn P. Riggiola, dated January 20, 2009 ("Riggiola Aff.").

this branch of this dispute" between Stone & Webster and Mitsubishi. (Award 8.) The Tribunal's Award covered several issues in the dispute in addition to Stone & Webster's claim for liquidated damages for the project's delay. It denied Stone & Webster's claim for liquidated damages for the delay arising out of the change-out of the combustor liners. (Award 645.) It granted Stone & Webster's warranty claim on failed expansion joints and awarded Stone & Webster $371,253. (Award 646.) It granted Mitsubishi's claims for compensation for certain material costs and awarded it $589,233.89. (Award 646.) It denied all of Mitsubishi's other counterclaims. (Award 646.)

On Stone & Webster's claim for delay-related liquidated damages, it found Mitsubishi responsible for 97.5[6] days of delay and found that the "total sum payable" from Mitsubishi to Stone & Webster was $14,504,519.11. (Award 645-46.) However, in a July 7, 2005 request for relief filed with the Tribunal, Mitsubishi requested that if the Tribunal were to find for Stone & Webster, it make an award "conditioned on the final outcome of the Texas Action" and that the Tribunal "retain jurisdiction of

[6] The original Award included a table suggesting that Mitsubishi was responsible for 108.5 days of delay as a result of a computational error by the Tribunal. The Tribunal corrected the error in its Award on Applications to Correct and Interpret a Partial Award ("Correcting Award"), which is attached as Exhibit C to the Affidavit of Alan Winkler, dated November 14, 2008 ("Winkler Aff."). (Correcting Award 27.)

this matter pending the outcome of the Texas Action."[7] (Award 642.)

In its Award, the Tribunal agreed that the "Award of Liquidated damages/rebates is contingent upon the outcome of the Texas action" and said it was "at the disposal of the Parties if there is a dispute as to how this Award should be interpreted in light of the Texas settlement agreement." (Award 642.) The arbitrators indicated they were aware of the settlement agreement at the time of the Award,[8] but "definitely [did] not know the extent to which [Mitsubishi's] liquidated damages incurred hereunder are included in the settlement between" Stone & Webster and AES. (Award 644.) The Tribunal further noted that in its last award in this matter, it retained jurisdiction for a future phase of the dispute and said that "[t]his agreement is still effective, and we await further information from the Parties." (Award 642.) In its "Summary and Conclusion" of the Award, the Tribunal reiterated that its liquidated damages Award for Stone & Webster was "obviously

[7] Mitsubishi reiterated this request in a letter to the Tribunal requesting the closure of the evidentiary record and an award from the Tribunal ("Mitsubishi Letter," which is attached as Exhibit E to the Affidavit of Alan Winkler dated February 13, 2009). Mitsubishi wrote that if "the Tribunal were to conclude that [Stone & Webster] has shown that Mitsubishi was responsible for some of the delay, then the parties would need to negotiate and/or the Tribunal might need to determine how much liquidated damages" Stone & Webster paid to AES. (Mitsubishi Letter 10-11.)

[8] Stone & Webster and AES entered into the settlement agreement in the Texas litigation after the May 2005 arbitration hearings, but before the October 2007 Award. (Award 10.)

conditional" on Stone & Webster's payment of liquidated damages attributable to Mitsubishi to AES. (Award 643-44.) It wrote that "if there is a dispute about this, we could be called upon to determine the issue" (Award 644), and it "retain[ed] jurisdiction and request[ed] that Counsel and the Parties coordinate with each other to discuss the next steps." (Award 647.) In its Award, each of the specific findings of days of delay and liquidated damages was conditioned on the following proviso: "provided always, that Stone and Webster are liable within the meaning of Turbine Contract Articles 9.1.2 or 9.1.3 to the Owner for that sum or some other sum not exceeding that sum (before the calculation of interest)." (Award 645-46.)

C

Mitsubishi initially moved to vacate the Award on January 18, 2008, pursuant to 9 U.S.C. § 10 and on the ground that it represented a "manifest disregard of the law." See Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 385 (2d Cir. 2003). That petition was withdrawn without prejudice while the parties waited for a decision from the Tribunal on motions to correct errors in the Award and to reconsider the Award. The Tribunal issued a further award on October 6, 2008, which interpreted its original Award and

corrected clerical and computational errors.[9] (Award on Applications to Correct and Interpret a Partial Award ("Correcting Award") 3.)[10]

On November 24, 2008, the Tribunal held a hearing on the motions by Mitsubishi to reconsider the Award and a motion by Stone & Webster to remove the contingent nature of the Award. It denied all of the motions on December 15, 2008 through a letter of summary decision ("Summary of Decision").[11] The Tribunal issued a more detailed explanation of its reasoning in its September 3, 2009 Award on Two Motions for Summary Disposition and a Motion to Re-Open the Partial Final Award ("Award on Reconsideration"). At the hearing on the motions, the Tribunal discussed the conditional nature of the Award. Edward Vena, a member of the Tribunal, noted that there was an "absence of knowledge" of whether liquidated damages attributable to Mitsubishi were included in Stone & Webster's settlement with AES. (Tr. of November 24, 2008 Hearing ("Tr.")

[9] The parties noted that there was a discrepancy between the text of the Award and the tables included in the Award. The Tribunal reviewed the Award under Article 30 of the ICDR Rules, which allows for review to correct clerical or typographical errors. The Tribunal did not change its decision as to the total number of days of delay and sum of money awarded. (Correcting Award 3.)

[10] The Correcting Award is attached as Exhibit C to the Winkler Affidavit

[11] The Summary of Decision is attached as Exhibit D to the Riggiola Affidavit.

232.)[12] The Chairman of the Tribunal, Robert Knutson, then engaged in a colloquy with Mr. Vena, agreeing that discovery may need to take place to reconcile the Award with the Texas settlement. (Tr. 232-33.) The Tribunal also requested certain expert reports that were submitted in the Texas litigation concerning delay calculations in anticipation of a future phase of arbitration. (Tr. 56-59, 64.)

Meanwhile, Stone & Webster brought a motion to confirm the Award on November 14, 2008 on the grounds that the Award must be confirmed under 9 U.S.C. § 9 because it is final and does not represent a manifest disregard of the law or provide any other ground for vacatur. Mitsubishi subsequently reinstated its petition to vacate. Mitsubishi's petition focused on the Tribunal's use of Stone & Webster's own project schedule instead of a "critical path method"[13] ("CPM") schedule as the baseline to evaluate the project's delay. Mitsubishi claimed the CPM schedule was required by the Supply Contracts and that, under New York law, the Tribunal did not have discretion to use another method. Mitsubishi made several additional arguments,

[12] The Transcript of the Tribunal's November 24, 2008 hearing is attached as Exhibit B to the Riggiola Affidavit.

[13] The critical path method uses a mathematical formula to determine the sequencing of a project and to calculate the minimum total time for completion. It "enables contractors performing complex projects to identify a critical path of tasks that must each be completed before work on other tasks can proceed." Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1232 (10th Cir. 1999).

including that the Tribunal only could award liquidated damages for equipment delays, not services, that liquidated damages were unjustly awarded past the date of provisional acceptance, and that the Chairman of the Tribunal planned to disregard the law and orders of this Court. In a subsequent brief in opposition to Stone & Webster's petition to confirm the Award, Mitsubishi raised for the first time its argument that the Award was not final and, thus, could not be confirmed.[14]

In its September 3, 2009 Award on Reconsideration, the Tribunal addressed whether its October 22, 2007 Award was final as part of its analysis of whether it should grant Mitsubishi's application for reconsideration. (Award on Reconsideration 107.) The Tribunal found that its Award was "Partial, Final and Certain." (Award on Reconsideration 131.) It noted that it had known about the Texas litigation throughout its proceedings and it "must have been obvious to both parties" that without knowledge of the outcome of the Texas action, "a final determination (non-contingent) on liability was inevitable." (Award on Reconsideration 120.) The Tribunal wrote:

> We cannot say with the Partial Final Award that the fact that ultimate payment is contingent upon determinations at a later stage makes it uncertain;- it makes it contingent, just as any award of damages is contingent upon a determination of liability and indeed vice versa. Once liability is found there has

[14] It should be noted that if the Tribunal's Award is not final, this Court has no power under the FAA either to confirm or vacate the Award. Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 414 (2d Cir. 1980).

> to be a determination that damages were suffered before the complainant receives a penny.

(Award on Reconsideration 110.) However, the Tribunal reaffirmed that its damages award was contingent and denied Stone & Webster's motion to remove the contingency of the Award. (Award on Reconsideration 167, 169.)

II

A

There is a threshold question in this case concerning the Court's statutory authority to review the arbitration Award. Under the FAA, a district court only has the power to confirm or vacate a final arbitration award. Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 414 (2d Cir. 1980). Generally, "[i]n order to be 'final,' an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them," resolving both liability and damages. Id. at 413. In Michaels, the Court of Appeals for the Second Circuit held that an interim award was not reviewable because it did not decide any of the plaintiff's claims and it determined liability but left open the question of damages on the defendant's counterclaims. Id. at 412-14.

The Court of Appeals has identified exceptions to this general rule in cases where the arbitrators decide a separate, independent claim, or where the parties expressly agree to

submit only the liability or damages phase of any one claim. Trade & Transp., Inc. v. Natural Petroleum Charterers Inc., 931 F.2d 191, 195 (2d Cir. 1991); Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 283 (2d Cir. 1986). In Metallgesellschaft, the Court of Appeals held that arbitrators are not required to decide all claims submitted to them for an award to be final. "An award which finally and definitely disposes of a separate independent claim may be confirmed although it does not dispose of all the claims that were submitted to arbitration." Metallgesellschaft, 790 F.2d at 283 (holding that award on defendant's freight claim was separate and independent from plaintiff's claim for short delivery and contamination). The Court of Appeals noted that the award "finally and conclusively disposed of a separate and independent claim and was subject to neither abatement nor set-off." Id.

Similarly, in Trade & Transport, the Court of Appeals identified an exception to the rule that both liability and damages must be decided. In that case, the parties orally agreed at a hearing before the arbitrators that only liability would be decided in a partial final award, with damages left for a later time. Trade & Transp., 931 F.2d at 192. The Court of Appeals held that the "submission by the parties determines the scope of the arbitrators' authority" and, thus, once the arbitrators decided liability, their decision was final. Id. at

195. Subsequent cases have confirmed that this exception applies only where the parties expressly agree to bifurcate liability and damages. See Employers' Surplus Lines Ins. Co. v. Global Reinsurance Corp., No. 07 Civ. 2521, 2008 WL 337317, at *5 (S.D.N.Y. Feb. 6, 2008) (holding that Trade & Transport did not apply because parties did not ask arbitrator to bifurcate liability and damages); Andrea Doreen, Ltd. v. Bldg. Material Local Union 282, 250 F. Supp. 2d 107, 112 (E.D.N.Y. 2003) (holding that while Michaels is the general rule, here "the parties agreed during an arbitration hearing to bifurcate liability from remedy" so award was reviewable); Corporate Printing Co. v. New York Typographical Union No. 6, No. 93 Civ. 6796, 1994 WL 376093, at *5 (S.D.N.Y. July 18, 1994) (finding that "the parties agreed to bifurcate the liability and remedy issues" and holding award final and reviewable).

Even if the arbitrators decide an independent claim or the parties agree to bifurcate the liability and damages phases of one claim, a final award must still "finally and conclusively dispose[]" of the claim decided by, or issue submitted to, the arbitrators. See Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc., 157 F.3d 174, 176 (2d Cir. 1998). In Rocket Jewelry Box, the Court of Appeals explained the test for finality as follows: "[A]n arbitration award, to be final, must resolve all the issues submitted to arbitration, and . . . it

must resolve them definitively enough so that the rights and obligations of the two parties, *with respect to the issues submitted*, do not stand in need of further adjudication." Rocket Jewelry Box, 157 F.3d at 176.

In this case, the parties present no evidence that they agreed to bifurcate the liability and damages portions of Stone & Webster's liquidated damages claim and to submit only the issue of liability to the Tribunal separately from the issue of damages. Instead, Stone & Webster initially sought an award of "recoverable or actual damages." (Award 14.) Likewise, Mitsubishi argued that if the Tribunal were to make an award in favor of Stone & Webster, "such award must . . . be conditioned" on the outcome of the Texas litigation. (Award 642.) The Tribunal understood that both liability and damages were before it and issued an Award that was "obviously conditional" on the Texas litigation. (Award 644.) Were the entire Award intended by the parties, and the arbitrators, to decide finally Mitsubishi's liability, separate from any issue of damages, no contingency would be required.

Moreover, whatever the parties' intentions with respect to bifurcating liability and damages, the Tribunal's Award does not definitively resolve the issue of liability for delay damages. Under the Supply Contracts, Mitsubishi's liquidated damages owed to Stone & Webster "shall become due" only if Stone & Webster

paid liquidated damages to AES. (Award 10.) Not only are the amount of Mitsubishi's damages contingent on the outcome of the Texas litigation, so is its liability. If Stone & Webster never pays AES liquidated damages, Mitsubishi will never incur liability. The Tribunal understood this, noting that "every element of the dispositive provisions of this Award is contingent upon corresponding liability at the higher level." (Award 10.) In its Award on Reconsideration, the Tribunal indicated it still needs to gather evidence about the Texas settlement to reach a final decision and rejected Stone & Webster's application to remove the contingent nature of the Award. (Award on Reconsideration 167.)

The Tribunal's refusal to reconsider its liability determination is not dispositive. It is of no effect that the Tribunal now considers its October 2007 Award to be final and certain as to liability; what matters is whether the Tribunal finally resolved the issue so that it does "not stand in need of further adjudication," Rocket Jewelry Box, 157 F.3d at 176, and is ready for review in this Court. In Employers', 2008 WL 337317, at *8, an arbitrator, on reconsideration of his original award, expressed that he had intended the original award to be final as to the issue of liability, but to leave damages open. However, the district court noted that courts in this Circuit only consider an arbitrator's intent on finality where a

separate, independent *claim* is at issue. Id. The court wrote that "irrespective of the arbitrator's intent, the partial award must resolve issues definitely enough so that the rights and obligations of the two parties do not stand in need of further adjudication." Id. (internal citations and alterations omitted). The court held that the award was not final in that case because the liability and damages issues "were not severable *claims*," damages were not finally determined, and the parties had not agreed to bifurcate the issues. Id.

Here, the original Award contingently decides the issue of Mitsubishi's share of responsibility for the delay and does not finally dispose of Stone & Webster's claim. In order to be final, an arbitrator's decision must have a binding effect on the parties. In this case, Stone & Webster is not entitled to any relief from Mitsubishi, nor could it use the Tribunal's contingent determination against Mitsubishi in any future proceeding. Therefore, the Award, even on the liability issue alone, is not final and not ready for review in this Court. As a result, this Court has no authority to review Mitsubishi's petition to vacate or Stone & Webster's motion to confirm the liquidated damages portion of the Award.

The Court of Appeals has cautioned against the review of non-final arbitration awards:

> Policy considerations, no less than the language of the [Federal Arbitration] Act and precedent construing

> it, indicate that district courts should not be called upon to review preliminary rulings of arbitrators. Most of the advantages inherent in arbitration are dissipated by interlocutory appeals to a district court. . . . [A] district court should not 'hold itself open as an appellate tribunal' during an ongoing arbitration proceeding, since applications for interlocutory relief 'result only in a waste of time, the interruption of the arbitration proceeding, and . . . delaying tactics in a proceeding that is supposed to produce a speedy decision.' . . . This case is a good example of how not to realize the alleged advantages of arbitration; 10 hearings over two years, with more to follow, is not a display of speed, economy or simplicity.

Michaels, 624 F.2d at 414-15 (internal citation omitted). So too in this case. The Tribunal has issued a plainly contingent decision on liability on the major claim at issue, which may or may not result in a final, enforceable award of unknown value. The arbitration was commenced in August 2003 and resulted in a 647-page "Partial Final Award" in August 2007. There followed a correction and, recently, a 168-page Award that, in part, declined to remove the contingency from the Partial Final Award. Judicial review by the district court and the court of appeals of a partial award that may never become enforceable to be followed by a subsequent round of judicial review after a final award, each review involving an examination of an extensive and in all likelihood redundant arbitration record, would not serve

the efficiency of the arbitration process or the judicial process.[15]

B

Because this Court has no statutory authority to review the liquidated damages portion of the arbitration Award, it does not reach the parties' arguments on the merits of whether that part of the Award should be vacated or confirmed. In discussing the liquidated damages claims, the arbitrators noted after each calculation of delay that the Award was being made "provided always that Stone and Webster are liable" to AES for liquidated damages. (Award 645-46.) Other portions of the arbitrators' Award are not so conditioned.

The remaining provisions of the Award are: 1) the denial of Stone & Webster's claims for liquidated damages for the delay arising out of the combustor liners; 2) the granting of Stone & Webster's expansion joint warranty claim; 3) the granting of Mitsubishi's counterclaim for compensation for material costs; and 4) the denial of Mitsubishi's remaining counterclaims, including payment for work to remedy contamination on Gas Turbine Number 1, for certain delay costs, and for a declaration

[15] The Court unsuccessfully attempted to have the parties agree to defer judicial review until there was a final enforceable award. The parties could not even agree on the terms of such a stipulation protecting the rights of all the parties.

that Stone & Webster was not entitled to draw down its letters of credit. (Award 606-07, 645-47.)

The parties' briefs so far have focused on the portion of the Award concerning liability for liquidated damages. In light of the Court's ruling that the liquidated damages portion of the Award is not final and not reviewable at this time, the parties should advise the Court if they believe there are portions of the Award that finally dispose of "separate independent claim[s]" and may be reviewed. Metallgesellschaft, 790 F.2d at 283. "The Court cannot partially confirm the Partial Award until it, and the parties, are clear on what it is confirming." Fluor Daniel Intercontinental, Inc. v. General Electric Co., No. 06 Civ. 3294, 2007 WL 766290, at *4 (S.D.N.Y. March 13, 2007) (deciding one part of award was not final but suggesting other parts could be confirmed after parties' advisement).[16]

CONCLUSION

For the reasons stated above, the petition to vacate the arbitration Award is **dismissed without prejudice**. The respondent's cross-petition to confirm the Award is also **dismissed without prejudice**. The parties may submit motions to confirm or vacate the remaining parts of the Award by **October**

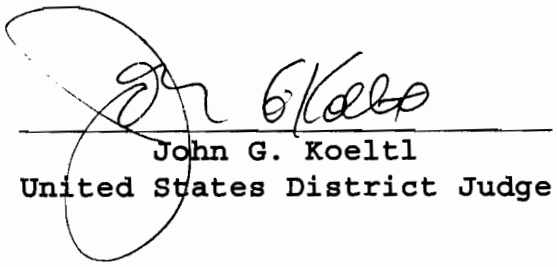
[16] The parties, of course, could agree to defer judicial review of all aspects of the arbitration process until there is a final award on all claims.

13, 2009 if they believe any remaining parts of the Award are final.

The Clerk is directed to close Docket Nos. 19 and 24.

SO ORDERED.

Dated: New York, New York
September 29, 2009



John G. Koeltl
United States District Judge